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REVENUE AND TAXATION

Tax Sales: Create Judicial Tax Foreclosure Procedures to Aid Low Income Housing Development

CODE SECTIONS: O.C.G.A. §§ 48-4-75 to -81 (new)
BILL NUMBER: SB 338
ACT NUMBER: 241
GEORGIA LAWS: 1995 Ga. Laws 272
SUMMARY: The Act creates judicial in rem tax foreclosure proceedings to avoid the inefficiency and lengthiness of nonjudicial foreclosure proceedings, which commonly result in nonmarketable and uninsurable titles to real property. The Act provides procedures and standards for the filing of a petition for foreclosure, a petition hearing, notice provisions, foreclosure sale, redemption, and the form of the tax deed.
EFFECTIVE DATE: July 1, 1995

History

SB 338 had its impetus with The Atlanta Project, which sought to address the lack of affordable housing and to promote urban revitalization.¹ Nonprofit housing organizations, such as Habitat For Humanity and Charis Community Housing, Inc., identified the need to make vacant property encumbered by tax liens available, with clear title, for affordable housing.² These organizations noted that some owners maximize income from these properties by renting them without making repairs or paying ad valorem taxes.³ Once the property becomes vacant and

1. Interview with Frank Alexander, Professor of Law, Emory University, in Atlanta, Georgia (Apr. 14, 1995) [hereinafter Alexander Interview]. Sen. Ron Slotin, a sponsor of the bill, referred the author to Frank Alexander as the authoritative source on SB 338. Telephone Interview with Sen. Ron Slotin, Senate District No. 39 (Apr. 14, 1995).

2. Record of Proceedings in the Senate Finance and Public Utilities Committee (Feb. 15, 1995) (remarks by Frank Alexander) (available in Georgia State University College of Law Library).

3. *Id.*

the taxes exceed the value of the property, there is little incentive for the owners to pay the taxes, and foreclosure becomes necessary.⁴

Recognizing that tax foreclosure sales are a means of returning abandoned property to productive use, the Georgia General Assembly passed the Land Bank Statute in 1990.⁵ This statute permits counties and cities to create Land Bank Authorities (LBAs) authorized to acquire and dispose of abandoned property, with preference given to developers of nonprofit affordable housing.⁶ One way an LBA acquires such property is through transfer of the property from the county or city after a tax foreclosure sale.⁷ An LBA also has the power to extinguish the taxes owed on these properties,⁸ thus making them affordable for nonprofit housing organizations to purchase and redevelop.⁹

Prior to the enactment of SB 338, such tax foreclosures were accomplished by nonjudicial means, pursuant to Code section 48-5-161.¹⁰ However, this procedure created a spectrum of problems, as identified by the Senate Study Committee on Governmental Barriers to Affordable Housing¹¹ and a study of the Fulton County/City of Atlanta Land Bank Authority.¹² First, the procedures were lengthy, often requiring years before title could pass to the new owner.¹³ Second, the existing procedures had constitutional due process problems because of a lack of

4. *Id.*

5. 1990 Ga. Laws 1875 (codified at O.C.G.A. §§ 48-4-60 to -65 (1991)).

6. *Id.* (codified at O.C.G.A. § 48-4-61(a) (1991)); 1992 Ga. Laws 1355 (codified at O.C.G.A. § 48-4-64(c) (Supp. 1995)).

7. 1992 Ga. Laws 1355 (codified at O.C.G.A. § 48-4-64(a) (Supp. 1995)).

8. *Id.* (codified at O.C.G.A. § 48-4-64(c) (Supp. 1995)) (granting LBAs authority to extinguish all county and city taxes, as well as school district taxes, after first obtaining the consent of the board of education in the district where the property is located).

9. FRANK S. ALEXANDER, *THE FULTON COUNTY/CITY OF ATLANTA LAND BANK AUTHORITY, INC.: PROBLEMS AND PROMISES 2* (Aug. 1994) [hereinafter *LAND BANK STUDY*] (available in Georgia State University College of Law Library); *see also* Alexander Interview, *supra* note 1.

10. 1990 Ga. Laws 1324 (codified at O.C.G.A. § 48-5-161 (1991)).

11. Alexander Interview, *supra* note 1. Sen. Slotin chaired the Senate Study Committee. Alexander Interview, *supra* note 1.

12. *LAND BANK STUDY*, *supra* note 9. This study was prepared by Frank Alexander, an Emory University Law School Professor and Carter Center Fellow.

13. Alexander Interview, *supra* note 1.

sufficient notice to the owner that the property was the subject of foreclosure proceedings.¹⁴ Finally, because of the constitutional defects in the procedures, many title insurance companies refused to insure the new titles.¹⁵ Thus, after taking years to accomplish foreclosure, many of the properties could not be sold because they lacked clear and marketable titles.¹⁶ An additional problem was that, because of a lack of clarity in the Land Bank Statute, an LBA lacked the authority to "bid" for these properties at a foreclosure sale by assuming the tax liability.¹⁷ Without actually purchasing the property with cash, an LBA could not extinguish the taxes and transfer ownership to the nonprofit housing organizations.¹⁸

The Senate Study Committee and an LBA study proposed three solutions to these problems. One recommendation was to create an efficient judicial in rem tax foreclosure procedure that would allow the foreclosed properties to be purchased by an LBA and resold to nonprofit housing organizations.¹⁹ The second recommendation was to restrict the statutory right of redemption with an automatic termination of the right if the owner fails to redeem the property within the statutory period.²⁰ The third recommendation was to clarify procedures for an LBA purchase at tax foreclosure to allow an LBA to tender a bid consisting of the costs of the sale along with assumption of liability for the outstanding taxes.²¹

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The purpose of the Act is to allow governmental entities to proceed with judicial in rem tax foreclosures by enactment of an ordinance or resolution in the county where the property is located.²² The Act creates article 5 in chapter 4 of title 48, which

14. Alexander Interview, *supra* note 1.

15. Alexander Interview, *supra* note 1.

16. Alexander Interview, *supra* note 1.

17. LAND BANK STUDY, *supra* note 9, at 3.

18. See LAND BANK STUDY, *supra* note 9, at 14.

19. LAND BANK STUDY, *supra* note 9, at 40.

20. LAND BANK STUDY, *supra* note 9, at 40.

21. LAND BANK STUDY, *supra* note 9, at 41.

22. O.C.G.A. § 48-4-76(a) (Supp. 1995). The new procedure authorized is optional, not mandatory. The old procedure can still be used. Alexander Interview, *supra* note 1.

provides a means of obtaining clear, marketable titles to properties that are the subject of tax foreclosure.²³

First, the Act states that such proceedings are only available to enforce liens for ad valorem taxes against property, not against the owners of the property.²⁴ Second, the Act limits the availability of this remedy to the government, not transferees of tax executions or liens.²⁵ Next, the Act specifies that the county tax commissioner may commence foreclosures pursuant to the new Code section twelve months after the taxes initially became delinquent.²⁶ The petition must be filed by the county tax commissioner in the superior court of the county where the property is located and must identify those portions of the property lying within the jurisdiction of the county.²⁷

The notice provisions in the Act are more comprehensive than those found in the nonjudicial procedures.²⁸ Copies of the petition must be sent via certified mail to all interested parties,²⁹ as well as to the occupants of the property, and must be posted on the property.³⁰ Notice of the petition must also be filed in the *lis pendens* docket of the county where the property is located.³¹ Additionally, within thirty days of the filing of the petition, notice must be published on two dates in the "official organ" of the county where the property lies.³²

The Act provides that a judicial hearing shall take place after thirty days following the filing of the petition.³³ At this hearing, any interested party can contest the delinquency of the taxes or the adequacy of the proceedings.³⁴ If the court finds for the county tax commissioner, the property can be sold free and clear of virtually all liens.³⁵ The sale becomes final after sixty days.³⁶

23. *Id.* §§ 48-4-75 to -81; Alexander Interview, *supra* note 1.

24. O.C.G.A. § 48-4-76(b) (Supp. 1995).

25. *Id.* § 48-4-76(c).

26. *Id.* § 48-4-78(a).

27. *Id.* § 48-4-78(b).

28. Alexander Interview, *supra* note 1.

29. O.C.G.A. § 48-4-78(d) (Supp. 1995); *see also id.* § 48-4-77(1)(A)-(C) (defining "interested parties").

30. *Id.* § 48-4-78(d).

31. *Id.* § 48-4-78(e).

32. *Id.* § 48-4-78(f).

33. *Id.* § 48-4-79(a).

34. *Id.*

35. *Id.* § 48-4-79(b). The Act provides for some exceptions, including liens

The Act also provides that an interested party may redeem the property up to the moment of sale by paying the back taxes owed.³⁷ If someone other than the owner redeems the property, that person acquires a lien on the property with the same priority as that of the tax commissioner.³⁸

If the property is not redeemed prior to the sale, it is sold at a sheriff's tax foreclosure sale.³⁹ The minimum bid on the property is the redemption amount, and the county tax commissioner may purchase the property for the minimum bid if a higher offer is not tendered.⁴⁰ The sale is binding from the moment of sale; however, the owner is entitled to a sixty-day redemption period.⁴¹ Any surplus from the sale is paid to the owner.⁴² Within thirty days following the expiration of the redemption period, the tax commissioner shall transfer title to the purchaser.⁴³

SB 338 was introduced with the endorsement of the Georgia Association of Realtors⁴⁴ and sent to the Senate Finance and

held by other Georgia governmental entities, easements, and covenants. *Id.* § 48-4-79(b)(1)-(4).

36. *Id.* § 48-4-79(a)(4).

37. *Id.* § 48-4-80(a).

38. *Id.* § 48-4-80(c).

39. *Id.* § 48-4-81(a).

40. *Id.* § 48-4-81(b). In section 4 of SB 89, the General Assembly amended O.C.G.A. § 48-4-64 to authorize an LBA to assume responsibility for the delinquent taxes in exchange for title to the property. 1995 Ga. Laws 282 (codified at O.C.G.A. § 48-4-64(a) (Supp. 1995)).

41. O.C.G.A. § 48-4-81(c) (Supp. 1995). "Owner" is defined as the owner of record in fee simple. *Id.* § 48-4-81(c)(2).

42. *Id.* § 48-4-81(f).

43. *Id.* § 48-4-81(d).

44. Telephone Interview with Keith Hatcher, Georgia Association of Realtors (Apr. 26, 1995) [hereinafter Hatcher Interview]. Hatcher initially questioned SB 338 and SB 89 because of concerns that commercial developers might have to bid against an LBA. *Id.* However, section 4 of SB 89, as enacted, only allows an LBA to make a binding assumption bid if no one else bids, and then only allows an LBA to bid once. *Id.*; 1995 Ga. Laws 282 (codified at O.C.G.A. § 48-4-64(a) (Supp. 1995)). This cured the problem of "failed sales" in which properties were left unsold because of the reluctance of commercial developers to bid amounts exceeding the value of the property (which, while rare, could occur if the delinquent taxes were high enough). Hatcher Interview, *supra*. The other concern involved the shortened redemption period for the delinquent property owner. Hatcher Interview, *supra*. As initially proposed in the Senate Study Committee, the

Public Utilities Committee.⁴⁵ The Act unanimously passed the Senate on February 20, 1995, with only a few technical amendments.⁴⁶ In the House, the bill was sent to the House Judiciary Committee and experienced some opposition in subcommittee.⁴⁷ There was concern over the cost of the new procedure⁴⁸ and a desire that each county have the power to

bill provided that foreclosure proceedings could be instituted after ninety days following the date upon which the taxes became delinquent, and the right of redemption lapsed after sixty days. Hatcher Interview, *supra*. The realtors were concerned that: (1) the rights of the property owners in redeeming their property were being usurped; and (2) the speed of the judicial procedure would frustrate the intent of the statute to provide clear titles to the property. Alexander Interview, *supra* note 1. In other words, the procedure's fast pace could cause, not alleviate, problems with obtaining clear title, and thus frustrate closings on these properties since title insurance companies will not insure clouded titles. See LAND BANK STUDY, *supra* note 9, at 10. To address the concerns of the Georgia Association of Realtors, the study group decided to extend the delinquency period to twelve months before the tax commissioner could institute foreclosure proceedings rather than extend the redemption period. Hatcher Interview, *supra*. This revision satisfied the concerns of the Georgia Association of Realtors, who sought to balance the interests of property owners with the interests of counties in returning the properties to the tax rolls. Hatcher Interview, *supra*. The Association endorsed the bill upon its introduction. Hatcher Interview, *supra*.

45. Alexander Interview, *supra* note 1.

46. Alexander Interview, *supra* note 1; Final Composite Status Sheet, Mar. 17, 1995.

47. Alexander Interview, *supra* note 1.

48. Tom Scott, SB 338—Implications for DeKalb County 2 (presented to the House Judiciary Committee in Feb. 1995) (available in Georgia State University College of Law Library); Telephone Interview with Tom Scott, DeKalb County Tax Commissioner (Apr. 26, 1995) [hereinafter Scott Interview]. Mr. Scott wanted the General Assembly to exempt property owners who qualified for homestead exemptions—individuals who own and occupy the property—from foreclosure under the provisions of SB 338. Scott Interview, *supra*. He noted that people who are having financial problems are at a disadvantage under the judicial foreclosure proceeding, because it requires that title be quieted as part of the procedure, thus raising the cost that a property owner must pay in order to exercise his right of redemption. Scott Interview, *supra*. Mr. Scott feared that with this additional cost burden, some delinquent taxpayers, who otherwise would have paid their bill, will be forced to let the property go to foreclosure. Scott Interview, *supra*. The existing nonjudicial procedure allows title to be quieted after the sale. Scott Interview, *supra*. Thus, quieting title is not part of the cost of redeeming the property. Scott Interview, *supra*. In

make the policy decision on whether to activate the procedure.⁴⁹ These concerns were addressed with an amendment that provides that counties and municipalities can choose to adopt the provisions of the Act by ordinance or resolution.⁵⁰

The full Judiciary Committee eventually recommended passage of the bill by a vote of 11 to 2.⁵¹ One of the dissenters, Representative Robert A. B. Reichert, wanted to add a requirement of a parcel-by-parcel approval from the county commission before the tax commissioner could proceed with the alternative judicial foreclosure procedure.⁵² In response, Professor Frank Alexander suggested a broader amendment that would allow the ordinance or resolution authorizing the procedure to also set forth criteria for selection of properties.⁵³ With this floor amendment in place, the House passed SB 338 by a vote of 123 to 1.⁵⁴ The Senate concurred with the amendments by the House, and Governor Zell Miller signed the bill on April 7, 1995.⁵⁵

SB 338 has met with considerable support among county commissions since its enactment. At the April 1995 meeting of the Association County Commissioners of Georgia, county attorneys were presented with a model resolution to use in adopting the provisions of the Act.⁵⁶ To date, two counties have adopted this alternative judicial foreclosure procedure as a means of returning abandoned tax-delinquent properties to productive use.⁵⁷ The law is also expected to be a tremendous benefit to

addition, the Act shortens the redemption period to sixty days, making it harder for property owners to raise the money to redeem their property. Scott Interview, *supra*.

49. Memorandum from James F. Grubiak, General Counsel, Association County Commissioners of Georgia, to Frank S. Alexander (Mar. 6, 1995) (available in Georgia State University College of Law Library).

50. O.C.G.A. § 48-4-76(a) (Supp. 1995).

51. Alexander Interview, *supra* note 1.

52. Alexander Interview, *supra* note 1.

53. SB 338 (HCSFA), 1995 Ga. Gen. Assem.

54. HR WEEKLY LEG. REP., at 4 (Mar. 18, 1995).

55. Final Composite Status Sheet, Mar. 17, 1995.

56. Telephone Interview with James F. Grubiak, General Counsel, Association County Commissioners of Georgia (Aug. 25, 1995).

57. Telephone Interview with Frank Alexander, Professor of Law, Emory University (Oct. 11, 1995). Professor Alexander confirmed that Fulton and Sumpter counties have adopted the measures set forth in O.C.G.A. §§ 48-4-75 to -81. *Id.* As of the date of the interview, the first petitions were being

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nonprofit housing groups and neighborhood development organizations by affording them access to previously unaffordable properties.⁵⁸

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filed in Fulton County, and Sumpter County has already held hearings on foreclosures. *Id.*

58. Ann Carrns, *New Foreclosure Law Clears Way to Claim Abandoned Sites*, ATLANTA BUS. CHRON., Apr. 14-20, 1995, at 3A.